85-856

Supreme Court, U.S.
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Case No.

SUPREME COURT OF THE UNITED STATES

Ninety-Ninth Term

FIDELITY AND CASUALTY COMPANY OF NEW YORK,
Plaintiff-Petitioner,

vs.

PHILADELPHIA RESINS CORPORATION,
Defendant-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, Case No. 83-1362.

PETITION FOR CERTIORARI

MONTGOMERY LITTLE YOUNG
CAMPBELL & McGREW, P.C.

J. Bayard Young
William H. ReMine, III
6900 East Belleview Avenue
Englewood, Colorado 80111
(303) 779-4344

ATTORNEYS FOR THE
PLAINTIFF-PETITIONER

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ISSUE

Does a forum state, or a federal court sitting in diversity, properly exercise long-arm jurisdiction over a nonresident defendant manufacturer in a products liability case, when the manufacturer has not sold the specific product or product line in the forum state but has placed the product line in the stream of interstate commerce, has advertised the product line to a nationwide market, and has sold other product lines in the forum state?

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Tenth Circuit were:

Fidelity and Casualty Company of New York, as subrogee of Compagnie Generale de Geophysique, a French corporation,

Plaintiff-Appellee,[1]

vs.

Philadelphia Resins Corporation,

Defendant-Appellant,[2]

and

Randall Rogers, d/b/a Roto Wing Enterprises,

Defendant.[3]

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1. Represented by William H. ReMine, III of the firm of Montgomery Little Young Campbell & McGrew, P.C., Denver and Englewood, Colorado.

2. Represented by Karen J. McClurg, D. Gary Christian, and Teresa L. Sturm of the firm of Kipp & Christian, P.C., Salt Lake City, Utah.

3. Randall Rogers was a defendant in the underlying proceeding in the United States District Court for the District of Utah but was not a party on the appeal.

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REFERENCE TO TENTH CIRCUIT OPINION

The Petitioner seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit, case no. 83-1362, as found in the opinion published at *Fidelity & Casualty Co. of New York v. Philadelphia Resins Corp.*, 766 F.2d 440 (10th Cir. 1985).

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked on the following grounds:

1. The judgment of the Tenth Circuit was entered on July 2, 1985.

2. Thereafter, on July 16, 1985, the Petitioner filed a petition for rehearing en banc. The petition for rehearing was denied on September 12, 1985.

3. The opinion of the Tenth Circuit and the order denying rehearing are reproduced in the Appendix to this Petition for Certiorari.

4. Review is sought pursuant to Supreme Court Rule 17.1(c) because the Tenth Circuit has decided an important question of federal law in a way conflicting with applicable decisions of the Supreme Court of the United States.

5. The Petition for Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 20.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The issue for review focuses on the doctrine of "minimum contacts" as a prerequisite to the exercise of *in personam* jurisdiction by the states and by the federal courts in diversity cases. The concept of "minimum con-

tacts" is derived from the due process clause of the Fourteenth Amendment, section 1, of the United States Constitution:

> *Article XIV. Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Jurisdiction over the defendant manufacturer in this case was asserted under the Utah long-arm statute, codified at Utah Code Ann. § 78-27-24, which reads in relevant part:

> 78-27-24. *Jurisdiction over nonresidents—Acts submitting person to jurisdiction.* Any person ... whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:
>
> (1) The transaction of any business within this state;
>
> (2) Contracting to supply services or goods in this state;
>
> (3) The causing of any injury within this state whether tortious or by breach of warranty;
>
> * * *

STATEMENT OF THE CASE

Compagnie Generale de Geophysique, a French corporation, brought this suit in the United States District Court for the District of Utah to recover the value of scientific

instruments that were destroyed in an accident in that state. During the proceedings, the property insurer, Fidelity and Casualty Company of New York, was substituted as the party plaintiff by right of subrogation. Subject matter jurisdiction was based on diversity of citizenship and amount in controversy under 28 U.S.C. § 1332. *In personam* jurisdiction over the defendants was based on the Utah long-arm statute, codified as Utah Code Ann. § 78-27-24.

During 1977 and 1978, Compagnie Generale had been compiling seismographic data in Utah for use in oil explorations by the American petroleum industry. Randall Rogers, one of the two defendants in the case, had been hired to provide helicopter services to transport personnel and equipment in the mountainous terrain. Rogers was based out of Arkansas. Before bringing his helicopter to Utah, Rogers purchased three non-metalic cables from Philadelphia Resins Corporation, the other defendant in the case. Philadelphia Resins, the manufacturer of the cables, was and is a Pennsylvania corporation with its principal place of business in Pennsylvania.

The incident giving rise to the case occurred in 1978 when one of the cables snapped while Rogers was lifting a load of instruments. The instruments plunged to the ground, resulting in a stipulated loss of $120,665. After the suit was filed, Philadelphia Resins challenged the exercise of *in personam* jurisdiction on the ground that its contacts with the state of Utah were insufficient. The trial court ruled that it had jurisdiction. The case was ultimately tried to a jury on theories of negligence and strict products liability, resulting in a verdict and judgment against Philadelphia Resins for damages and pre-judgment interest. Philadelphia Resins appealed.

While noting that Philadelphia Resins fell within the purview of the Utah long-arm statute, the majority of the Tenth Circuit panel held that "minimum contacts" with the state were lacking for purposes of due process. The remaining judge wrote a strong dissent. The essential difference of opinion was over the meaning and effect of the decision of the Supreme Court of the United States in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

Both the majority and the dissenting judge recognized that Philadelphia Resins promoted and sold its products throughout the country. The products were of two general types, epoxy resins and non-metalic cables. Epoxy resins were sold through a network of distributors, but the cable products were sold directly to consumers with no formal distributorship network. Sales orders for the cable products were taken by three staff employees and approximately thirty outside representatives in the United States and Canada.[4] From 1976 to 1978, the company's sales of all products ranged from $2,857,682 to $3,259,732, with sales inside the state of Pennsylvania accounting for only a small proportion of the total revenues.[5] Although the majority found that Philadelphia Resins' products had been sold in all fifty states, the company had not sold its cable products to customers in Utah before the date of the accident. Nonetheless, Philadelphia Resins had attempted to serve a national market with its cables. Between 1976 and 1978, the company spent from $40,000 to $56,000 per year[6] advertising its products, including its non-metalic cables, in trade publications disseminated nationally.

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4. Record at Vol. I, page 47.
5. Record at Vol. I, pages 60-61.
6. Record at Vol. I, pages 51-52.

As pointed out by the dissenting judge, Rogers testified that he saw Philadelphia Resins' ad for cables in a national aviation magazine and thereafter contacted the company. The brochures Philadelphia Resins sent him depicted its cable being used on land, at sea, and in the air, and a reprint of a magazine article included with the brochures described the cable's use in "oceanographic moorings, instrument arrays and tow cables, helicopter winching systems, balloon tethers, and aerial hoists." Rogers also testified that use at high altitudes was relevant to the lift strength of the helicopter and that although he was to take delivery of the cables in Arkansas, he told the sales representative he would be using the cables for helicopter hoisting in the Rocky Mountain area. One of Philadelphia Resins sales representatives testified that the representatives were required to determine exactly how the cables were to be used in order to help the customer select the appropriate type of cable.

In the view of the majority, the *World-Wide Volkswagen* case significantly narrowed previous concepts of "minimum contacts" based on the placing of a product in the stream of interstate commerce. The majority held that the presence of the cables in Utah was fortuitous and thus insufficient to support *in personam* jurisdiction over the manufacturer.

On certiorari, the Petitioner seeks a reversal of the Tenth Circuit's decision. Two other issues, involving an evidentiary ruling and the application of Utah's comparative negligence statute, were addressed by the briefs on appeal but were not reached by the Tenth Circuit. The Petitioner does not seek to raise them on certiorari. If the decision of the Tenth Circuit is reversed, the Petitioner asks that the case be remanded for a determination of the remaining issues.

ARGUMENT

The Tenth Circuit has misapplied the principles announced in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). For the reasons set forth below, certiorari should be granted in order to elaborate on the contours of the "minimum contacts" doctrine and to re-establish the proper limits of *in personam* jurisdiction in products liability cases.

In *World-Wide Volkswagen* the Court considered whether Oklahoma could exercise jurisdiction over a non-resident car dealer and its wholesale distributor. Those defendants' only connection with Oklahoma was the sale of an automobile in New York to New York residents who subsequently became involved in an accident in Oklahoma. The car dealer did business only in New York. The wholesaler confined its distribution of automobiles to retailers in New York, New Jersey, and Connecticut. Neither defendant solicited business in Oklahoma through salespersons or through advertising reasonably calculated to reach the state. Accordingly, Oklahoma's assertion of jurisdiction over those defendants violated due process. Two other defendants, the manufacturer and the national importer, did not pursue the jurisdictional issue beyond an unsuccessful special appearance in the district court. The discussion in *World-Wide Volkswagen* was directed only at the propriety of asserting long-arm jurisdiction over a local retail seller and a relatively local distributor based solely on the foreseeability of the product being transported to a distant state. In this context, the Court said:

> If foreseeability were the criterion, a local California tire *retailer* could be forced to defend in Pennsylvania when a blowout occurs there, a Wisconsin *seller* of a defective automobile jack could be haled before a dis-

> trict court for damage caused in New Jersey or a Florida soft-drink *concessionaire* could be summoned to Alaska to account for injuries happening there. Every seller of chattels would in effect appoint the chattel his agent for service of process. (Emphasis added; citations omitted).

Id. at 296. These examples all involve local sellers, not manufacturers of a product sold nationwide.

The Court went on to distinguish the situation where products are distributed beyond a localized or regionally confined market. In describing conduct sufficient to permit long-arm jurisdiction, it said:

> Hence if the sale of a product of a manufacturer or distributor ... is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

Id. at 297-98. The critical inquiry under *World Wide Volkswagen* is whether a defendant has attempted to serve a market and expects its product to be used there. The cases decided since *World-Wide Volkswagen* have held that a manufacturer which distributes its products in interstate commerce is subject to an action for products liability even in a state where the manufacturer has no direct contacts. *E.g., Le Manufacture Francaise des Pneumatiques Michelin v. District Court,* 620 P.2d 1040 (Colo. 1980); *State ex rel. Hydraulic Servocontrols Corp. v. Dale,* 294 Or. 381, 657 P.2d 211 (1982).

The *World-Wide Volkswagen* case reflects the practical realities of defendants' commercial activities. Small merchants whose products are intended for a limited market area should not be subjected to a foreign jurisdiction outside the market area. By contrast, a manufacturer of goods distributed nationally is in a different position with regard to the fairness of having to defend in other states. Large nationwide and multistate businesses, which make efforts to sell their products to as broad a market as possible, purposefully make use of the free channels of commerce and should be held accountable for legal actions arising out of their products in those states where users or consumers have been affected.

The majority of the Tenth Circuit panel has departed from the declared principles of *World-Wide Volkswagen*. It has erred by treating Philadelphia Resins as if it were a mere localized vendor and in so doing has written an opinion that encroaches on the legitimate jurisdictional powers of the states. At stake is an important question of federal law needing further articulation by the Supreme Court, and upon which certiorari should be granted.

APPENDIX

Following the signature of counsel and the certificate of service, there is reproduced as an Appendix the opinion of the Tenth Circuit and the order denying rehearing.

Respectfully submitted,
MONTGOMERY LITTLE YOUNG
CAMPBELL & McGREW, P.C.

By: J. Bayard Young
J. Bayard Young
William H. ReMine, III
6900 East Belleview Avenue
Englewood, Colorado 80111

(303) 779-4344

ATTORNEYS FOR THE
PLAINTIFF-PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 1985, three copies of this PETITION FOR CERTIORARI have been served upon counsel for the Respondent, Philadelphia Resins Corporation, by placing them in the United States mail, postage prepaid, addressed to:

D. Gary Christian, Esq.
Kipp & Christian, P.C.
600 Commercial Club Building
Salt Lake City, Utah 84111

By: William H. ReMine, III
Willian H. ReMine, III

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FIDELITY and CASUALTY CO. OF NEW YORK,
Plaintiff/Appellee,
v. No. 83-1362
PHILADELPHIA RESINS CORPORATION,
Defendant/Appellant

On Appeal From the United States District Court
For the District of Utah
Civil Action No. C-80-0025W

William H. ReMine, III, of MONTGOMERY LITTLE YOUNG CAMPBELL & MCGREW, P.C., Englewood, Colorado, Attorney for Plaintiff/Appellee.

Karen J. McClurg (D. Gary Christian and Teresa L. Sturm on the brief) of KIPP AND CHRISTIAN, P.C., Attorneys for Defendant/Appellant.

Before BARRETT and SEYMOUR, Circuit Judges, and KANE,* District Judge.

BARRETT, Circuit Judge.

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*The Honorable John L. Kane, Jr., United States District Judge for the District of Colorado sitting by designation.

Philadelphia Resins Corporation (PRC), a Pennsylvania Corporation, and one of two defendants in the district court, appeals from judgment for the plaintiff, Fidelity and Casualty Company of New York. Plaintiff's insured was a French geophysical exploration company, Compagnie Generale de Geophysique (CGG).

This was a tort action which arose from an accident in a mountainous area north of Salina, Utah, on February 11, 1978. CGG had been conducting seismic operations in the area, and had contracted with Randall Rogers, a helicopter pilot from Pea Ridge, Arkansas, to fly CGG's seismic equipment and personnel to and from testing sites in the field. Prior to leaving for Utah to perform his transportation contract with CGG, Rogers contacted PRC by telephone and ordered three "Phillystran" synthetic fiber cables for use in suspending loads from the helicopter. Rogers had contacted PRC after reading an advertisement for the cables in "Aerial Applicator" magazine, a trade publication. R. Vol IV, p. 125. Rogers told the PRC employee that he planned to use the cable in the Rocky Mountain region, although he did not know at the time what particular state he would be taking the cable to. R. Vol. IV, p. 134. PRC shipped the cables to Rogers' address in Arkansas, and Rogers brought them to Utah for use in performing his contract with CGG. On February 11, 1978, Rogers was lifting equipment belonging to CGG with his helicopter when the "Phillystran" cable snapped and the load fell to the ground, resulting in approximately $120,000 in damage to the equipment.

On January 15, 1980, CGG commenced this lawsuit, naming Rogers and PRC as defendants, alleging sale by PRC of a defective product and negligence on the part of both PRC and Rogers. PRC made a special appearance to

contest the court's *in personam* jurisdiction, but the court disagreed with PRC's position, deciding the question in favor of the plaintiff. After substitution of the insurance company as the named plaintiff, the cause was tried to a jury. The jury returned a special verdict, finding that Rogers was not negligent, that CGG was 12% negligent, and that PRC was 88% negligent. The jury further found that PRC had sold a defective product unreasonably dangerous to the user. Judgment was rendered accordingly, and PRC now appeals, raising three distinct issues for our review. However, we will consider only the first issue raised by PRC, that being whether or not the Utah district court had *in personam* jurisdiction over the Pennsylvania corporation. Because we find that *in personam* jurisdiction over PRC was lacking, we will dismiss without consideration of the other issues of substantive law.

The question whether a federal court has *in personam* jurisdiction over a nonresident defendant in diversity cases is determined by the law of the forum state. *Yarbrough v. Elmer Bunker & Associates*, 669 F.2d 614 (10th Cir. 1982). In applying this rule, the district court exercised *in personam* jurisdiction over PRC in accordance with Utah's "long arm" statute, which provides that a nonresident submits himself to the jurisdiction of the Utah courts on any claim arising from "The causing of injury within this state whether tortious or by breach of warranty." Utah Code Ann. § 78-27-24 (Supp. 1983).[1] The statute, on its face, applies to PRC, and because the Utah legislature has specifically directed that the statute "should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution," Utah Code Ann. § 78-27-22 (Supp. 1977), the "minimum

contacts" doctrine of *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945) becomes critical. Our inquiry is thus reduced to a single question: Does PRC have sufficient "minimum contacts" with the State of Utah to support the exercise of *in personam* jurisdiction?

Before examining the law of "minimum contacts" and applying that law to the facts of this case, we will review the evidence presented in the district court concerning PRC's contacts with the State of Utah. We note in this regard that the burden of establishing *in personam* jurisdiction over the defendant is on the plaintiff. *Yarbrough v. Elmer Bunker &*

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1. Utah Code Ann. § 78-27-24 (Supp. 1983) provides:

78-27-24. Jurisdiction over nonresidents—Acts submitting person to jurisdiction. Any person ... whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:

(1) The transaction of any business within this state;

(2) Contracting to supply services or goods in this state;

(3) The causing of any injury within this state whether tortious or by breach of warranty;

(4) The ownership, use, or possession of any real estate situated in this state at the time of contracting.;

(5) Contracting to insure any person, property or risk located within this state at the time of contracting.;

(6) With respect to actions of divorce and separate maintenance, the maintenance in this state of a matrimonial domicile at the time the claim arose or the commission in this state of the act giving rise to the claim.; or

(7) The commission of sexual intercourse within this state which gives rise to a paternity suit ... to determine paternity for the purpose of establishing responsibility for child support.

Associates, *supra*. PRC is in the business of manufacturing and selling a variety of epoxy resin compounds, [2] as well as a variety of tower guys, ropes, and cables. PRC sells some 10-15% of its products in Pennsylvania, and has sold its products in all fifty states, although it has never sold "Phillystran" cables (the product used by Rogers) to customers in Utah. R. Vol. I, pp. 48, 51. From 1978 through 1980, PRC made sales of its other products to a total of ten customers in Utah, amounting to less than one-tenth of one percent of PRC's gross sales. R. Vol. I, pp. 63-64. PRC's epoxy resin products are sold through a network of distributors, but its "Phillystran" cables are sold directly to consumers with no distributorship network. R. Vol. I, p. 47. PRC advertises in trade publications targeted at specific professions or industries, which presumably have a national circulation, although, as PRC stated in answer to an interrogatory, "There is no way of determining where advertising ultimately ends up. Publications may well be disseminated worldwide." R. Vol. I, p. 52. There is no evidence that PRC advertises by any method specifically directed at the Utah market, nor is there any evidence that PRC employs any personnel in Utah. The sum total, then, of PRC's contacts in Utah are: (1) a miniscule number of sales of products other than "Phillystran" cable, (2) advertising in a national trade magazine that presumably reaches Utah, and (3) the failure of one of its defective "Phillystran" cables in Utah after the cable was taken there by one of its customers.

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2. These epoxy resin compounds include chocking and grouting compounds, adhesives and coatings, repair compounds, flooring and anti-skid compounds, and tank lining systems. R. Vol. I. pp. 46, 47.

The leading case on the "minimum contacts" doctrine is *International Shoe Co. v. State of Washington, supra.* In that case, the State of Washington had asserted *in personam* jurisdiction over the International Shoe company for the purpose of assessing mandatory contributions to the State's unemployment compensation fund. The company was a Delaware corporation with its principal place of business in St. Louis, Missouri. It argued that the exercise of *in personam* jurisdiction was improper in that the company had no office in Washington, stocked no merchandise there, had no agent for service of process in the State, and made no contracts for the sale or purchase of merchandise there. The company did, however, employ some eleven to thirteen salesmen in the state, who exhibited samples of merchandise and solicited orders from prospective buyers. The result of these salesmen's efforts was a substantial volume of merchandise shipped into the State from St. Louis. The Court began its analysis by stating that the traditional, strictly territorial notion of *in personam* jurisdiction expressed in *Pennoyer v. Neff*, 95 U.S. 714 (1877) had given way to a more flexible standard:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." (Citations omitted.) 326 U.S. at 316.

The Court was not specific on just what kinds of "minimum contacts" would suffice:

> It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative.

> The test is not merely, as had sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less... Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of laws which it was the purpose of the due process clause to insure. (Citations omitted.) *Id.* at 319.

There were hints in the Court's opinion that one factor in the decision would be whether the defendant's contacts were related to the plaintiff's claim or were unrelated to it. *Id.* at 318. Since the company's sales activities in this case were obviously related to the State's assessment claim, *id.* at 320, the Court had no occasion to explore the point.

In *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), the Court made it clear that *in personam* jurisdiction over a corporation could be supported by sufficient contacts in the forum state, even though such contacts were entirely unrelated to the plaintiff's claim. In this case, the defendant was a mining company with mines in the Phillipine Islands. When the Islands were occupied by the Japanese during World War II, the company's president moved his operations to an office in Ohio. All of the company's limited wartime activity was carried on from the Ohio office; secretaries were hired, correspondence was maintained, salary checks were drawn on local banks, etc. The activity was described by the Court as "continuous and systematic." When a disgruntled nonresident shareholder sued the company in Ohio, the Ohio courts refused to exercise *in personam* jurisdiction because the claim was unrelated to the company's contacts with Ohio. The Court noted the difference between the *Perkins* facts and the *International Shoe* facts, and stated: "The instant case

takes us one step further to a proceeding *in personam* to enforce a cause of action not arising out of the corporation's activities in the state of the forum." 342 U.S. at 446. The Court proceeded to enumerate the company's rather substantial contacts with the State of Ohio and concluded that the due process clause did not prohibit the court of Ohio from taking jurisdiction of the case if it were appropriate to do so under state law.

In contrast with the *Perkins* fact situation, the facts in *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957) involved a defendant with minimal contacts with the forum state, but the contacts that existed were directly related to the plaintiff's claim. In *McGee*, the plaintiff, a California resident, was the beneficiary of a life insurance policy, who sued in a California court to collect the proceeds of the policy after the insured (also a California resident) died. The defendant was a Texas-based insurance company that had assumed the obligations of the insurance contract from another insurance company. The defendant had mailed a reinsurance certificate to the insured in California, and the insured had mailed premiums from his home in California to the defendant's Texas office. The defendant maintained neither office nor agent in California, and had neither solicited nor done business there, apart from the transaction with this insured.

Nevertheless, the Court found the exercise of *in personam* jurisdiction to be valid. The Court made the following comment on the trend of "minimum contacts" law:

> Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy

> over the years. Today many commercial transactions touch two or more states and may involve parties separated by a full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity. 355 U.S. at 222-23.

The Court then decided that jurisdiction was appropriate on the following rationale: "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." *Id.*

The Court's language in *McGee* suggested a more lenient and expansive view of the "minimum contacts" doctrine; but a year later the Court's position stiffened somewhat in the case of *Hanson v. Denckla*, 357 U.S. 235 (1958). In a complex fact situation involving the settlor of a trust who had changed her residence from Pennsylvania to Florida, competing beneficiaries of the trust, and a Delaware-based corporate trustee, the Court struck down the Florida Court's exercise of jurisdiction over the defendant Delaware trustee. Any contacts the trustee may have had with the State of Florida were, in the Court's view, due solely to the fact that the settler had moved there, and were not a result of any choice made by the defendant trustee. The Court elaborated on the "minimum contacts" test:

> The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. 357 U.S. at 253.

We now turn to the area of products liability and examine the "minimum contacts" doctrine in that context. Two cases in this area are particularly relevant to our inquiry. The first case is *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961). In *Gray*, the plaintiff, an Illinois resident, had purchased a water heater in Illinois that had been manufactured by the American Radiator & Standard Sanitary Corporation in Pennsylvania. The manufacturer had used a safety valve in the water heater that was made by the Titan Valve Manufacturing Company in Ohio. Titan's safety valve had failed, causing the water heater to explode and injuring the plaintiff. The plaintiff named Titan as a defendant; Titan, however, claimed that *in personam* jurisdiction was lacking in Illinois because it did no business there. The Illinois Supreme Court disagreed, holding that *in personam* jurisdiction over Titan was supported by the fact that Titan had placed its safety valves into the stream of interstate commerce, with the expectation that at least some of the valves would be used in Illinois. Even though delivery into Illinois was accomplished by middlemen, the court found that Titan's business was indirectly affected and benefitted by transactions occurring in Illinois; therefore it would not be unreasonable to require Titan to defend in that state. *Gray, supra*, 176 N.E.2d at 766; *accord Ehlers v. U.S. Heating and Mfg. Corp.*, 124 N.W.2d 824 (Minn. 1963); *Buckeye Boiler Co. v. The Superior Court of Los Angeles County*, 458 P.2d 57 (Cal. 1969).

The limits of the "stream of commerce" theory exemplified by *Gray* were delineated by the United States Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). In this case, the plaintiffs were a couple who had purchased a new Audi automobile from a

dealer in New York. The plaintiffs were on their way to Arizona in the automobile when an accident occurred in Oklahoma. They brought a products liability action in an Oklahoma court, naming as defendants the manufacturer of the Audi, the importer, the distributor, and the dealer. The manufacturer and the importer conceded *in personam* jurisdiction, but the distributor and dealer contested jurisdiction. The distributor and dealer both conducted only local operations in the New York City metropolitan area, and had no contacts with Oklahoma other than their contractual arrangements with the nationwide Volkswagen/Audi network and the fact that an automobile that they had sold had somewhat fortuitously caused injury in Oklahoma. The Court found that *in personam* jurisdiction over the distributor and dealer was lacking, rejecting the argument that the defendants could have foreseen that their automobile might cause injury in Oklahoma:

> It is argued, however, that because an automobile is mobile by its very design and purpose it was "foreseeable" that the Robinson's Audi would cause injury in Oklahoma. Yet "foreseeability" alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.
>
> * * *
>
> If foreseeability were the criterion, a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there ...; a Wisconsin seller of a defective automobile jack could be haled before a distant court for damage caused in New Jersey ...; or a Florida soft-drink concessionaire could be summoned to Alaska to account for injuries happening there ... Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel.
>
> * * *
>
> This is not to say, of course, that foreseeability is

> wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. ... The Due Process Clause, by ensuring the "orderly administration of the laws," ... gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.
>
> * * *
>
> Hence, if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has then been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. *Cf. Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d, 432, 176 N.E. 2d 761 (1961). 444 U.S. at 295-98.

There is a subtle distinction between cases like *Gray* and the *World-Wide Volkswagen* case that is critical to the disposition of the instant case. If a defendant's product comes into the forum state as a result of a deliberate, although perhaps indirect, effort of the defendant to serve the forum state's market, then that defendant is subject to jurisdiction there. Placing one's product into the "stream of commerce" with the expectation of distribution into particular areas is the classic example of such an indirect effort. If, however, the defendant's product comes into the forum

state as the result of the actions of an unconnected third party or of fortuitous events over which the defendant has no control, then the defendant is not subject to jurisdiction in the forum state. The distinction in these cases is really no more than a refinement of the "purposefully availing" test of *Hanson v. Denkla, supra.*

In applying the law of "minimum contacts" to the facts of this case, we hold that PRC's contacts with the state of Utah were insufficient to support the exercise of *in personam* jurisdiction by the district court. The instant cause of action arose, ultimately, from PRC's successful advertising efforts in Arkansas, together with the fortuitous transport of a PRC product into Utah; not from any effort PRC may have made to sell its products in Utah or to transport its products into Utah. Although PRC's employee may have known that the cable was destined for use in the Rocky Mountain region, which includes Utah, it was never specifically foreseeable by PRC that its product was destined for the Utah market. PRC's relationship to the Utah market is simply too attenuated to support *in personam* jurisdiction under the "stream of commerce" theory expressed in the *Gray* case. Furthermore, we do not believe that PRC's advertising efforts change this conclusion. Although PRC's advertisement in a trade publication with presumably national circulation is relevant to the inquiry, it is less important than it would have been had the advertisement been seen and acted upon in Utah. If such had been the case, we believe that there would likely exist a close relationship between the advertising that had reached Utah and the cause of action.

While *in personam* jurisdiction can be based on contacts with the forum state that are either related to the

cause of action or are unrelated to it, the "minimum contacts" doctrine requires contacts in the latter case to be more substantial. *See, e.g., Perkins v. Benguet Consolidated Mining Co., supra; Olsen By Sheldon v. Government of Mexico,* 729 F.2d 641, 648 (9th Cir. 1984); Lilly, *Jurisdiction Over Domestic and Alien Defendants,* 69 Va. L. Rev. 85, 100 (1983); Brilmayer, *How Contacts Count: Due Process Limitations On State Court Jurisdiction,* 1980 Sup. Ct. Rev. 77, 82 (1980). In this case, the only contact that PRC has with Utah which is related to the cause of action is the fact that a PRC product happened to fail and cause damage in the State. The *World-Wide Volkswagen* Court made it clear that a seller of chattels does not, in effect, "appoint the chattel his agent for service of process." *World-Wide Volkswagen Corp. v. Woodson, supra,* 444 U.S. at 296. PRC's knowledge of the mere possibility that its product might be taken into a region of the country in which Utah is located is not sufficient, in our view, to make a difference in this regard. PRC also has contacts in Utah that are unrelated to the cause of action, namely advertising (which we assume reaches the state) and sales of other products there, but these unrelated contacts are likewise insufficient to support the exercise of *in personam* jurisdiction.[3]

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3. Inasmuch as federal courts acquire *in personam* jurisdiction in accordance with the law of the forum state and the Utah "long-arm" statute in this case authorizes jurisdiction on claims "arising from" certain activities of the defendant (see footnote 1), it is doubtful whether the defendant's unrelated contacts with Utah are even relevant to the jurisdictional inquiry. This is a question of Utah law that we need not and do not decide.

We hold that PRC's contacts with the state of Utah, as shown by the record, are insufficient to support the exercise of *in personam* jurisdiction over PRC in accordance with the Due Process Clause. Thus, the judgment of the district court is vacated and the action is DISMISSED.

SEYMOUR, Circuit Judge, dissenting:

Because my review of the record convinces me that personal jurisdiction is present under *World-Wide Volkswagen,* I must respectfully dissent.

My disagreement with the majority centers on the application of *World-Wide Volkswagen* to the facts before us. In my view, a critical distinction exists between the defendants who successfully challenged in personam jurisdiction in *World-Wide* and defendant here. The defendants in *World-Wide* were a retail dealer and a regional distributor, whereas defendant in the instant case is the manufacturer. The manufacturer and national importer in *World-Wide,* Audi and Volkswagen, did not pursue the jurisdiction issue beyond an unsuccessful special appearance in district court. *See World-Wide,* 444 U.S. at 288 n.3. Thus the discussion in *World-Wide* was directed at the propriety of asserting long-arm jurisdiction over a relatively local distributor and a local retail seller based on foreseeability alone. In this context, the Court stated:

> "If foreseeability were the criterion, a local California tire *retailer* could be forced to defend in Pennsylvania when a blowout occurs there, a Wisconsin *seller* of a defective automobile jack could be haled before a distant court for damage caused in New Jersey or a Florida soft-drink *concessionaire* could be summoned to Alaska to account for injuries happening there. Every seller of chattels would in effect appoint the chattel his agent for service of process."

Id. at 296 (emphasis added) (citations omitted). These

examples all involve local defendant *sellers*, not *manufacturers* of a product sold nationwide. I believe this distinction is significant because the Court was careful in its discussion to differentiate between the defendants who sought to serve a national market, Audi and Volkswagen, and the defendants who served only a local market, World-Wide and Seaway.

In describing conduct by a defendant sufficient to permit long-arm jurisdiction, the Court stated:

> "[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. Cf. *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961)."

Id. at 297-98. In view of the above passage, I do not believe that the Court in *World-Wide* narrowed the stream of commerce theory, at least with respect to national manufacturers and distributors. The critical inquiry under this theory is whether a defendant has attempted to serve a market and expects its product to be used there.

The record before us reveals that a sales representative from PRC admitted that PRC sells cable throughout the United States, and that it advertises nationally. Rogers testified that he saw PRC's cable ad in a national aviation magazine at an airport and thereafter contacted the com-

pany. The brochures PRC sent to Rogers depicted its cable being used on land, at sea, and in the air, and a reprint of a magazine article included by PRC with its brochures described the cable's use in "oceanographic moorings, instrument arrays and tow cables, helicopter wenching systems, ballon tethers, and aerial hoists." Rec., supp. vol. II, pl. dep. ex. 3. One persuasive indication that a manufacturer seeks to serve a market for its product in the forum state is its solicitation of business "through advertising reasonably calculated to reach the State." *World-Wide,* 444 U.S. at 295. A manufacturer such as defendant here, who advertizes its product in a national magazine as suitable for use anywhere, does so in an attempt to serve the market for its product nationwide. Defendant is thus more analogous to the manufacturer in *World-Wide* than to the local distributor or retailer in that case.

Rogers also testified that use at high altitudes was relevant to the lift strength of the helicopter, and that he had told PRC's sales representative he would be using the cable for helicopter hoisting over the Rocky Mountain area. One of PRC's sales representatives testified that the representatives were required to determine exactly how the cable was to be used in order to help a customer select the appropriate type of cable.

In sum, the record shows that PRC aimed its advertising at a national market. PRC also knew when the cable in this case was sold that it was to be used in the Rocky Mountain area encompassing the state of Utah. Given these facts, I am convinced that the sale of the cable arose from the efforts of PRC to place its product in the stream of commerce with the expectation that it would be sold and used in all states, including Utah. In my view, it is not

unreasonable under the controlling cases to require PRC to defend in Utah, and long-arm jurisdiction is therefore appropriate. I would affirm the trial curt's conclusion that it had personal jurisdiction over PRC.

JULY TERM - September 12, 1985

Before Honorable William J. Holloway, Jr., Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Circuit Judges, and Honorable John L. Kane, Jr., District Judge*

FIDELITY AND CASUALTY CO., OF NEW YORK, Subrogee of: COMPAGNIE GENERALE DE GEOPHYSIQUE, a corporation,

Plaintiff-Appellee,

vs. No. 83-1362

PHILADELPHIA RESINS CORPORATION, a Pennsylvania corporation,

Defendant-Appellant,

and

RANDALL ROGERS d/b/a ROTO WING ENTERPRISES,

Defendant.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing

is denied by the panel that rendered the decision sought to be reheard. Judge Seymour voted to grant rehearing.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

*Of the United States District Court for the District of Colorado, sitting by designation.

Supreme Court, U.S.
FILED
DEC 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-856

In The
Supreme Court of the United States
October Term, 1985

FIDELITY AND CASUALTY COMPANY OF NEW YORK,

Plaintiff-Petitioner,

vs.

PHILADELPHIA RESINS CORPORATION,

Defendant-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, Case No. 83-1362

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KIPP AND CHRISTIAN, P.C.

D. GARY CHRISTIAN
KAREN J. MCCLURG
600 Commercial Club Building
32 Exchange Place
Salt Lake City, Utah 84111

Attorneys for the Defendant-Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTION PRESENTED

Should a Federal District Court sitting in a diversity action dismiss for lack of personal jurisdiction tort claims against a foreign corporation when that corporation's only contacts with the forum state are the failure of a product within the forum state and a miniscule number of isolated sales of different and unrelated products to buyers in the forum state?

LIST OF PARTIES

Devcon Holdings, Inc., a Delaware Corporation, is the parent company of Philadelphia Resins Corporation. Philadelphia Resins Corporation has no subsidiaries, except a wholly-owned subsidiary, or affiliates.

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SUMMARY OF ARGUMENT

The opinion of the Tenth Circuit in this case is entirely in accordance with the decisions of the Supreme Court of the United States regarding the application of *in personam* jurisdiction by a forum state over a foreign corporation.

———o———

ARGUMENT

The petitioner asserts that a Writ of Certiorari is appropriate in this case because the Tenth Circuit has decided an important question of federal law in a way conflicting with applicable decisions of the Supreme Court of the United States. On the contrary, the decision of the Court published at *Fidelity & Casualty Co. of New York v. Philadelphia Resins Corp.*, 766 F.2d 440 (10th Cir. 1985) does not conflict with any applicable decisions of the United States Supreme Court. The thoughtful and well-reasoned opinion by the Tenth Circuit demonstrates that the Court carefully analyzed and adhered to the previous pronouncements of the Supreme Court of the United States dealing with the issue of *in personam* jurisdiction.

The petitioner argues that the Tenth Circuit erred in determining that the State of Utah did not have personal jurisdiction over the defendant, Philadelphia Resins Corporation; the petitioner is incorrect in claiming that the result reached by the Tenth Circuit is inconsistent with the decision in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The Tenth Circuit opinion gives a careful and detailed history of the developments and

trends affecting the doctrine of due process as it applies to *in personam* jurisdiction and its requirement of minimum contacts. The ultimate holding harmonizes with the facts found in each of the landmark decisions of the Supreme Court.

The Tenth Circuit recognized that the application of the rule of minimum contacts "will vary with the quality and nature of the defendant's activity", *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), and that "[w]hether due process is satisfied must depend upon the quality and nature of the activity in relation to the fair and orderly administration of laws which it was the purpose of the due process clause to insure." *International Shoe Co. v. State of Washington*, 326 U.S. 310, 319 (1945). The Tenth Circuit carefully reviewed and considered the contacts which Philadelphia Resins Corporation had with Utah, the forum state, prior to the accident which gave rise to this litigation:

> "The sum total then, of [Philadelphia Resins Corporation's] contacts in Utah are: (1) a miniscule number of sales of products other than 'Phillystran' cable, (2) advertising in a national trade magazine that presumably reaches Utah,[1] and (3) the failure of one of its defective 'Phillystran' cables in Utah after the cable was taken there by one of its customers." 766 F.2d at 443. (Footnote added by respondent.)

Clearly, these minimal contacts with the State of Utah are insufficient to confer personal jurisdiction over Phila-

---

[1]With respect to the advertising, the Court further noted that although the Philadelphia Resins' advertisement was seen by the purchaser of the cable in a trade publication which presumably had national circulation, the advertisement was not seen or acted upon in the State of Utah. 766 F.2d at 447.

delphia Resins Corporation for the claims made in this action.

The Tenth Circuit's dismissal of the action is entirely consistent with the decisions of the United States Supreme Court setting forth the requirements for minimum contacts which will uphold a finding of *in personam* jurisdiction over a foreign corporation. The minimal contacts with Utah by Philadelphia Resins were not related to the claims asserted by the plaintiff, as in *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957). Nor were Philadelphia Resins' contacts with Utah continuous and systematic, as in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), where the defendant's substantial contacts with the forum state were unrelated to the plaintiff's claims. Neither did Philadelphia Resins' contacts with Utah come about by reason of its placing a product into the stream of interstate commerce with the expectation that at least some of that product would be sold or used in the forum state, as established in *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961).

The mere fact that the product somehow finds its way into the forum state does not subject the foreign manufacturer to personal jurisdiction in the forum state. If that were the case, as this Court recognized in *World-Wide Volkswagen Corp. v. Woodson, supra,* the "seller of chattels would in effect appoint the chattel his agent for service of process." 444 U.S. at 296.

The Tenth Circuit in this case correctly summarized the differences between *Gray v. American Radiator & Standard Sanitary Corp., supra,* where personal jurisdic-

tion over a foreign manufacturer was upheld, and *World-Wide Volkswagen Corp. v. Woodson, supra,* where personal jurisdiction over a foreign distributor and foreign dealer was found lacking:

> "There is a subtle distinction between cases like *Gray* and the *World-Wide Volkswagen* case that is critical to the disposition of the instant case. If a defendant's product comes into the forum state as a result of a deliberate, although perhaps indirect, effort of the defendant to serve the forum state's market, then that defendant is subject to jurisdiction there. Placing one's product into the 'stream of commerce' with the expectation of distribution into particular areas is the classic example of such an indirect effort. If, however, the defendant's product comes into the forum state as the result of the actions of an unconnected third-party or of fortuitous events over which the defendant has no control, then the defendant is not subject to jurisdiction in the forum state. The distinction in these cases is really no more than a refinement of the 'purposefully availing' test of *Hanson v. Denckla, supra.*
>
> • • •
>
> "While *in personam* jurisdiction can be based on contacts with the forum state that are either related to the cause of action or are unrelated to it, the 'minimum contacts' doctrine requires contacts in the latter case to be more substantial." 766 F.2d at 446, 447.

In the instant case, the contacts of Philadelphia Resins Corporation with the State of Utah are entirely too insubstantial to require it to defend a lawsuit commenced in Utah. Due process requires that its contacts with Utah consist of some substantial activity with some degree of continuity before a finding of *in personam* jurisdiction over Philadelphia Resins Corporation can be sustained.

CONCLUSION

In dismissing the action against Philadelphia Resins Corporation, the Tenth Circuit Court of Appeals correctly interpreted and applied the doctrines enunciated by the United States Supreme Court regarding *in personam* jurisdiction over a foreign corporation. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

KIPP AND CHRISTIAN, P.C.

D. GARY CHRISTIAN
KAREN J. MCCLURG
600 Commercial Club Building
32 Exchange Place
Salt Lake City, Utah 84111

Attorneys for the Defendant-Respondent